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## **Michigan State Historic Preservation Office (SHPO) Section 106 Consultation Guidelines for Cellular Communications Projects**

Section 106 of the National Historic Preservation Act of 1966, as amended (NHPA), requires federal agencies to take into account the effects of their undertakings on historic properties and afford the Advisory Council on Historic Preservation (Council) a reasonable opportunity to comment. The historic preservation review process mandated by Section 106 is outlined in regulations issued by the Council. These regulations, *Protection of Historic Properties*, were revised in June of 1999 and are codified in 36 CFR Part 800. The Federal Communications Commission (FCC) must comply with Section 106 for any activity requiring a permit, license, or approval from the FCC. While the FCC may authorize its applicants to initiate consultation, compile information, and conduct necessary studies, the FCC remains legally responsible for complying with Section 106 for all activities under its jurisdiction. These guidelines are intended to assist FCC applicants and their consultants in evaluating the effects of their undertakings on historic resources and explain the SHPO's perspective when reviewing projects.

Please note that Section 106 of the National Historic Preservation Act is a separate and distinct statutory authority from the National Environmental Policy Act, or NEPA. The requirements of one law do not necessarily satisfy the other. For example, Section 106 does not recognize categorical exclusions. However, documentation gathered as part of the NEPA process can be used to fulfill documentation requirements for Section 106 if it meets the standards for documentation established in 36 CFR Part 800.11. The Section 106 application and instructions, lists the information required (in accordance with 36 CFR Part 800.11) to initiate Section 106 consultation with the SHPO. Because it is a federal agency's responsibility to identify historic properties and evaluate project effects upon those properties, the SHPO will not review and comment upon projects submitted according to the so-called "NEPA Checklist".

If you would like to learn more about the Section 106 consultation process, please visit the Advisory Council on Historic Preservation's website, [www.achp.gov](http://www.achp.gov). The Advisory Council offers nationwide seminars in the Section 106 process, as does the National Preservation Institute (NPI). For more information about NPI seminars in Section 106 and cultural resource management, visit their website at [www.npi.org](http://www.npi.org).

### **Consulting Parties**

The regulations implementing Section 106 require federal agencies to consult with the State Historic Preservation Officer (SHPO) and an appropriate Tribal Historic Preservation Officer (THPO). Although the SHPO does not coordinate tribal consultation, the SHPO takes consultation with Indian tribes very seriously and makes every effort to support this effort. Even if an Indian tribe has not been certified by the National Park Service to have a THPO that can act for the SHPO on its lands, Indian tribes must be consulted about undertakings on or affecting their lands. Relevant tribes must also be consulted when undertakings off tribal lands will impact historic resources of significance to the tribe. Consultation with Indian tribes must respect tribal sovereignty and the relationship between the federal government and Indian tribes.

Public involvement is a key component in successful Section 106 consultation. The views of the public should be solicited and considered throughout the Section 106 process. Other parties to be consulted include Native Hawaiian organizations (when relevant), local governments, federal permit or license applicants and the public. The Council may also choose to participate in consultation under certain circumstances.

### **Defining the Area of Potential Effects (APE)**

The regulations define the Area of Potential Effects (APE) as the “geographic area or areas within which an undertaking may directly or indirectly cause changes in the character or use of historic properties, if any such properties exist” (36 CFR Part 800.16). The regulations also acknowledge that the APE “is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking.”

While acknowledging that the APE is dependent upon the circumstances of the project, the SHPO recommends the following APE boundaries for cellular communications projects in Michigan:

1. For construction of new towers or increasing the height of an existing tower (either through co-location or through an addition to the actual tower)
  - 0.5 mile radius for structures up to 150 feet
  - 1 mile radius for structures 151-250 feet
  - 1.5 mile radius for structures 251-350 feet
  - 2 mile radius for structures 351-450 feet
  - Exceptionally tall towers (450 feet or more) will have an accordingly larger APE.

Topography, vegetation, non-historic development, and the character of any historic properties in the area can affect the size of the APE. Michigan has a fairly flat topography, making tall structures visible for a great distance. Structures placed on higher elevations will also have increased visibility. Such factors may justify increasing the APE regardless of tower height.

The APE for archaeological resources only shall be the project footprint, including all areas subject to ground disturbance, such as anchor areas for guy wires. Generally, co-locations do not have impacts on archaeological resources.

2. Expansion of existing cellular tower compound
  - This type of project may involve breaking new ground in an area where there has been no previous consideration of historic resources. Potential impacts to archaeological resources are a concern as well as visible elements that may diminish the character of an historic resource.
  - The SHPO recommends a minimum APE of a 0.25mile radius.
3. Installation of a cellular communications antenna or other device on a (non-communication tower) building or structure (*e.g.* water tower, high tension utility tower, church steeple, barn, silo, etc.)
  - Despite industry terminology, the SHPO does not consider this activity to be a “co-location”.
  - This activity may result in physical or visual impacts to historic resources. Consideration must also be given to the impacts this type of undertaking could have on the surrounding environment, particularly when the building or structure is located within an historic district.

- The SHPO recommends an APE of at least a 0.25-mile radius in rural areas and a radius equal to 3 city blocks in urban areas.

## **Identifying Historic Properties**

The regulations define an historic property as “any prehistoric or historic district, site, building, structure or object included in, *or eligible for inclusion in*, the National Register of Historic Places maintained by the Secretary of the Interior” (36 CFR Part 800.16). The National Register is the nation’s list of cultural resources worthy of preservation. The SHPO’s publication *Eligible or Not Eligible (Preservation Details*, Volume 2, 1997) addresses how resources are evaluated based on the national register criteria. The SHPO’s brochure concerning the National Register of Historic Places Program also provides information about the criteria for national register eligibility. To be considered for national register eligibility, a resource is generally fifty (50) years of age or older (exceptions to the “fifty year rule” are made in some rare instances) and retains integrity of location, design, setting, materials, workmanship, feeling and association. Notably, the condition or maintenance of a resource is less of a factor when evaluating eligibility than its integrity. In fact, those resources that may not be in the best condition, have deferred maintenance, or few “improvements” (siding, replaced features, additions, etc.) often have the greatest historic integrity. When a federal agency and the SHPO disagree on the eligibility of a particular resource, the matter is submitted to the Keeper of the National Register (National Park Service) for a final decision.

Federal agencies must identify historic properties within a project’s APE when conducting Section 106 consultation. A good faith effort must be made to acknowledge not only those properties that are listed in the national register or Michigan’s State Register of Historic Sites, but also those that may not yet have been identified by the SHPO or the national register program as meeting the national register criteria. Furthermore, it is just as important to consider what lies below the ground in the form of archaeological resources as it is to consider buildings, structures, sites and districts. While the SHPO maintains a list of historic properties that are listed in the state and national registers, please remember that there is no comprehensive list or database of all historic properties (i.e. national register-eligible buildings, structures, sites and districts) in Michigan.

The adequacy of information submitted to the SHPO to initiate consultation is extremely important for a timely review of your project. Please remember that the SHPO is not mandated to conduct research regarding historic properties and currently cannot accommodate researchers except by special permission. Furthermore, because the SHPO generally does not conduct site visits concerning Section 106 projects, we rely on you to be our “eyes” in the field.

The SHPO recognizes that it is often difficult to gather information about historic properties in a project area and there may not be any information available at all. Nonetheless, parties considering consultation with the SHPO should conduct a reasonable amount of background research before submitting project information to the SHPO. We suggest that the following resources be considered when conducting this research:

#### General Resources

- city or county assessor offices
- colleges and universities, particularly those whose faculty work on local history in your project area
- local historians
- local historic district commissions or historical societies
- local, regional or state libraries
- long-term property owners or neighbors

#### Specific Resources

- city directories
- old city atlases and plat maps
- county and local histories
- deed records
- property abstracts
- tax records

In addition, names of sites listed in the National Register of Historic Places can be found at the National Park Service website, [www.nps.gov](http://www.nps.gov). Resources listed in the state or national registers in Michigan can be found at **Michigan Sites-on-Line**, [www.michigan.gov/shpo](http://www.michigan.gov/shpo).

Because the identification of historic properties often requires specialized knowledge and professional qualifications, we strongly recommend that you enlist the skills of a professional in the field of cultural resources management (CRM) and historic preservation. The SHPO has lists of qualified consultants who can assist you in identifying historic properties and evaluating project impacts. When the SHPO does not feel that information regarding historic properties is adequate to form an informed opinion of project effects on resources, an archaeological or above-ground cultural resources survey may be required, the costs of which will be borne by the party responsible for the undertaking.

### **Evaluating Project Effects on Historic Resources**

After a federal agency has identified a project's area of potential effects and made efforts to identify historic properties within the APE, the next step is to evaluate the effect of the project on those historic resources. Please remember that this evaluation specifically regards the effects of the project on historic properties. It has nothing to do with how the project will improve cellular communication, provide economic benefits, create jobs, and so on.

The Section 106 regulations recognize three different findings of effect: *no historic properties affected*, *no adverse effect* (with or without conditions), and *adverse effect*. While the federal agency or a delegated authority may initiate the consultation process with a finding of effect, the SHPO may disagree with that finding and respond with a different opinion on the finding. Findings of effect should be based on an informed analysis of the project and historic properties in the APE. Attempts to avoid identifying historic properties or to circumvent the Section 106 process with blanket responses of *no historic properties affected*, particularly when there is no demonstrated basis for the finding, are likely to be countered with requests for more information from the SHPO.

When no historic properties are present or affected by a project, a finding of *no historic properties affected* is appropriate. In most cases where historic properties are present, it is best to apply the regulatory criteria of *adverse effect* to assess project impacts. Projects that may affect historic properties, but the effect will not be adverse (*e.g.*, rehabilitating an historic building in accordance with the Secretary of the Interior's *Standards for the Treatment of Historic Properties*) are said to have *no adverse effect* on

historic properties. Sometimes certain conditions are imposed to ensure that the effects of the project will not become adverse.

### **Adverse Effect**

According to the regulations, “An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association. Consideration shall be given to all qualifying characteristics of a historic property, including those that may have been identified subsequent to the original evaluation of the property's eligibility for the National Register. Adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative” (36 CFR Part 800.5(a)(1)).

Adverse effects on historic properties include, but are not limited to (36 CFR Part 800.5(a)(2)):

- Physical destruction of or damage to all or part of the property;
- Alteration of a property, including restoration, rehabilitation, repair, maintenance, stabilization, hazardous material remediation and provision of handicapped access, that is not consistent with the Secretary's *Standards for the Treatment of Historic Properties* (36 CFR Part 68) and applicable guidelines;
- Removal of the property from its historic location;
- Change of the character of the property's use or of physical features within the property's setting that contribute to its historic significance;
- Introduction of visual, atmospheric or audible elements that diminish the integrity of the property's significant historic features;
- Neglect of a property which causes its deterioration, except where such neglect and deterioration are recognized qualities of a property of religious and cultural significance to an Indian tribe or Native Hawaiian organization; and
- Transfer, lease, or sale of property out of Federal ownership or control without adequate and legally enforceable restrictions or conditions to ensure long-term preservation of the property's historic significance.

Adverse effect determinations require that the agency seek alternatives, take measures to avoid impacts to the resource and continue the consultation process with the SHPO and other relevant parties. The process culminates in the execution of a memorandum of agreement (MOA), which outlines the agreed-upon measures to mitigate adverse effects.

### **Case Studies**

Evaluating the effects of a federal undertaking upon historic resources can be one of the thorniest issues in the Section 106 consultation process. Sometimes the effect is very obvious, such as when the project will require the demolition of a national register listed property. Sometimes the nature of the effect is not as obvious, or multiple factors will contribute to the overall project impact. We have provided some hypothetical case studies of typical cellular communications projects to assist you in your evaluation of effects.

Case 1: Construction of a New 250' Cellular Communications Tower in a Rural Area

After studying a one-mile radius APE for this project, the applicant has identified twenty-five historic properties within the APE. In consultation with the SHPO and after further research, it has been determined that these historic properties are part of a larger national register eligible rural historic district composed of families of German farmers who all immigrated to this region from Bavaria. These families have lived in this community for over one hundred years and their culture, habits and farm buildings reflect their common origin. After consulting the property owner, the applicant has identified the location of the original farm residence, a log cabin, now a low rectangular depression marked by a collapsed brick chimney and an ancient lilac bush. The property owner has also noted that over the years, family members have found evidence of Native American activity in the form of arrowheads, skinning stones, and fire-cracked rock on the farm. All locations of finds were confined to a sandy ridge that cuts across the farm.

Even though many of the structures face away from the proposed cell tower location, it was determined that the project will have an *adverse effect* on this rural historic district because the project will introduce a visual feature that will diminish the integrity of significant historic features of this rural historic district. The area's pristine rural appearance of rolling farmlands and orchards is just as important to its integrity as its buildings. The proposed tower would introduce a highly visible and incompatible element to this environment.

The fact that other non-historic features, such as power lines and signage, had already been introduced in this area does not diminish the *adverse effect* of this project. In the first place, the other elements are not the subject of this review – the cellular communications tower is (had they been reviewed it is likely those projects would also have been found to have an *adverse effect*). Secondly, Section 106 considers the cumulative effects of multiple impacts to historic resources – provided the resources retain a reasonable degree of integrity. Undertakings that will further impact a resource whose integrity is already threatened in other ways are evaluated on the same basis as if the integrity of the impacted resource was perfectly retained.

- In this case, an *adverse effect* could be avoided by finding an alternative location for the tower outside of the historic district or by utilizing technology that would enable the tower/device to be sensitively camouflaged or hidden within a structure such as a silo or church steeple. In addition, it is likely that an Archaeological survey would be required due to the evidence of native American activity on the property, to ensure that any excavation carried out in the construction the communications tower would not disturb any archaeological resources that are eligible for listing in the National Register of Historic Places.

Case 2: Attachment of Cellular Communications Antennae to a Building dated 1890

The fifteen-story Conlee Building in Detroit, constructed for the offices of lumber baron Robbert Conlee in 1890, is eligible for listing in the National Register of Historic Places. It is one of the finest examples of early skyscraper design by architect Walter Hightower in Michigan. XYZ Communications Inc. is proposing to place two cellular communications antennae on the top cornice of the building. After consultation with the SHPO, the SHPO issued an opinion of *adverse effect* on the grounds that the antennae will cause physical damage to part of the property and they introduce a visual element that diminishes the property's significant historic features. As proposed, the antennae would be in a location visible from the street and neighboring buildings. As in Case 1, the fact that other antennae and radio equipment have already been placed on the building does not reduce the adverse effect resulting from this action.

- In this case, an *adverse effect* could be reduced or avoided by identifying an alternative location for the antennae that will not impact the historic property, by taking precautions so that the antennae can be removed without permanently scarring the building, or by carefully camouflaging the antennae and placing them in an inconspicuous location.

Case 3: Attachment of Cellular Communications Antennae to a Building dated 1990

Generally, buildings less than fifty years of age are not considered eligible for listing in the National Register of Historic Places. In this case, however, the building is located within the national register listed Oak Street Historic District and special care has been taken to design a building that would be compatible with its surrounding historic environment. After consultation with the SHPO, it was determined that the undertaking would have *no adverse effect* on the Oak Street Historic District *with the condition* that the antennae are hidden from view at street level and from neighboring buildings.

**When the Process is not Followed: Section 110 (k) of the NHPA and Federal Agency Foreclosure**

Section 106 outlines a process; a system of checks and balances, whereby historic properties are given full consideration in the planning of federally assisted projects. When these requirements are avoided, either knowingly or unknowingly, our nation's heritage suffers. The Section 106 regulations recommend that historic properties be addressed early in the project planning stages, while alternatives are still available. A variety of problems and delays can arise when Section 106 compliance is put off until the last minute or ignored altogether.

Section 110(k) of the National Historic Preservation Act "prohibits a Federal agency from granting a loan, loan guarantee, permit, license or other assistance to an applicant who, with intent to avoid the requirements of Section 106, has intentionally significantly adversely affected a historic property to which the grant would relate, or having legal power to prevent it, has allowed such significant adverse effect to occur, unless the agency, after consultation with the Council, determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant" (36 CFR Part 800. 9(c)(1). In other words, if the FCC finds that a tower has already been built or an antennae installed without Section 106 compliance, perhaps because the applicant felt that compliance was a hassle, the

agency can withhold the permit or license. The agency has a variety of means at its disposal to ensure future compliance from the applicant or to compensate for past non-compliance.

A term that is commonly used in Section 106 consultation is *foreclosure*. Related to Section 110(k) of the NHPA, foreclosure means an action taken by an Agency Official that effectively precludes the Council from providing comments that the Agency Official can meaningfully consider prior to the undertaking. The Council may review a case to determine whether a foreclosure has occurred. The Council shall notify the Agency Official and the agency's Federal Preservation Officer and allow 30 days for the Agency Official to provide information as to whether foreclosure has occurred. If the Council determines foreclosure has occurred, the Council shall transmit the determination to the Agency Official and the head of the agency. The Council shall also make the determination available to the public and any parties known to be interested in the undertaking and its effects upon historic properties. (36 CFR Part 800. 9(b))

The SHPO is sometimes consulted on projects that have already proceeded without consultation. In these cases, the SHPO does not retroactively comment on such projects, but may recommend to the Council that a foreclosure has occurred. As described above, the Council and the Agency then consult.

## **Recommendations for Good Consultation Documents**

The SHPO has issued a memorandum, *Information Needed for a Project Review*, regarding the information we require in order to initiate a review of your project. We urge you to follow this memorandum as closely as possible. Please pay special attention to the following when submitting your projects:

### **Format**

- Submit the project information in a clear and logical format (follow our memorandum);
- Reference the SHPO's ER project number in all correspondence;
- Reference your internal project number or project identifier in all correspondence and use it consistently
- Provide a clear and detailed description of the project at the outset. For example, if it is a "co-location", will it be a co-location on an existing cellular communication tower, on a radio tower, water tower, building, smokestack, or high-tension utility tower? There is a tremendous difference from the SHPO's point of view. This description should stand out. Do not embed this description deep within your project information so that it is difficult for a reviewer to find.

### **APE**

- Identify the project APE with justification;
- Make a good faith effort to identify historic properties within the APE.

### **Maps and Photographs**

- Include clear, quality photographs of historic properties within the APE keyed to a map of the project area;
- Photographs of the project area should be keyed to a map and should give someone who is not at the site a reasonable impression of the general character of the location. In this regard, clear aerial photographs or wide angle views of the site area may be helpful;

- Provide high quality maps, such as US Geological Survey maps, which illustrate the features of the landscape. In urban areas, provide maps that show street names and urban layout in detail;
- Correctly identify map quadrangle;
- Make sure map and text locations are in agreement;
- When a project is in a township, identify the county it is in;
- The boundaries of Michigan's cities and townships are sometimes confusing. Be sure you have distinguished one from the other in your project submissions.

Good project submissions will benefit you by reducing project review times and developing a working relationship with the SHPO. Furthermore, if done early, the consultation process can successfully reduce or avoid adverse impacts to historic resources. We would like to offer a few additional recommendations to streamline and improve the consultation process:

- When submitting projects, assume the "cold reader" – someone who knows nothing about the site, the project, or the technology;
- Consult with the SHPO and others early in the planning process so that alternatives can be considered and adverse effects can be avoided;
- Remember that the more information submitted at the beginning, the fewer times the SHPO will have to request more information;
- Educate yourself in the Section 106 consultation process;
- Obtain the services of an historic preservation professional in planning projects that may impact historic resources;

Respect the SHPO's thirty (30) day project review time – requests to rush projects through or calls for project status before the 30 day period is up only result in delays to your project and the many other projects we are mandated to review.